IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No. 3368 of 2007

For Approval and Signature:

HONOURABLE MR.JUSTICE K.M.MEHTA

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1 Whether Reporters of Local Papers may be allowed to see the judgment ? **-No.**

2 To be referred to the Reporter or not ? **-No.**

3 Whether their Lordships wish to see the fair copy of the judgment ? **-No.**

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ? **-No.**

5 Whether it is to be circulated to the civil judge ? **-No.**

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USHABEN ARVINDBHAI PATEL - Appellant(s)
Versus
ARVINDBHAI RAMBHAI PATEL - Defendant(s)

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Appearance :

MS DR KACHHAVAH for Appellant(s) : 1,MR KAMLESH KACHHAVAH for Appellant(s) : 1,
MR PRAKASH K JANI for Defendant(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE K.M.MEHTA

Date : 17/08/2007

ORAL JUDGMENT

1. Ushaben Arvindbhai Patel, appellant-original petitioner has filed this appeal against the

judgment and order dated 27/2/2007 passed by the learned 5th Additional Civil Judge in Civil Misc. Application No.36 of 2004 filed by the wife for restoration of the H.M.P. Application No.31 of 2000. Hence, Admit. Mr.Jani, learned advocate waives Rule on behalf of Respondents. With consent of parties, matter is taken for final disposal.

2. Heard Ms.Kachhavah, learned advocate for the appellant and Mr.P.K.Jani, learned advocate for the respondent.

3. Facts giving rise to this appeal are as under:

3.1) A marriage was solemnized between appellant Ushaben and respondent Arvindbhai in the year 1982 according to Hindu customs. Out of the said wedlock, one daughter named Priyanka was born on 13/8/1989.

3.2) It appears that thereafter, some difference and dispute arose between the husband and wife in

connection with the possession of daughter Priyanka and thereafter proceedings under the Guardian Wards Act was initiated before the learned District Judge, Valsad and in the said matter, the learned Judge by his order dated 30/10/1999 decided the case of custody of the child in favour of the applicant Arvindbhai-father of the child.

3.3) It is the case of the husband that somewhere in 1995, without showing any reason, wife has left the matrimonial home and also taken some ornaments with her. Though the husband has tried to settle the matter, wife did not come to the matrimonial home.

3.4) It appears that thereafter, husband has filed Hindu Marriage Application No.76 of 1997. The said application was also allowed somewhere on 31/3/1999. Inspite of the same, wife did not come to the matrimonial home.

3.5) In view of the same, respondent-husband has

filed Hindu Marriage Application No.31 of 2000 before the Civil Judge (SD), Valsad for obtaining divorce in this behalf. In view of the fact that though the order was passed in favour of the husband on 31/3/1999, wife has failed and neglect to come to the matrimonial home for one year, notice was issued to the wife. Though sufficient opportunity was given to the wife, wife did not appear and did not file any reply. Ultimately, the Court has closed the right of wife to file reply and evidence by order dated 27/3/2001. Thereafter, the Trial Court has framed issues and ultimately by judgment and order dated 14/2/2002, pleased to allow the application of the applicant-husband and held that both the husband and wife are staying separately since last one year and it is not possible for both of them to live together and their marriage has been completely broken down. The learned Judge has held that husband has proved that he is entitled for the decree of divorce in this behalf.

3.6) In view of the aforesaid position, the

learned Judge has passed an order of decree of divorce on 14/2/2002.

3.7) Thereafter, wife has filed application No.36 of 2004 for quashing and setting aside the order of the learned Trial Judge dated 14/2/2002 passed in Application NO.31 of 2002. In the said application, notice was issued to the husband and ultimately, the learned Trial Judge by his judgment and order dated 27/2/2007, held that wife has failed to prove that the judgment and decree dated 14/2/2002 for divorce is liable to be quashed and set aside and therefore, the learned Trial Judge has rejected the application filed by the wife for restoration of the application no.31 of 2002.

4. Being aggrieved by the said order dated 27/2/2007, the wife has filed this appeal before this Court somewhere on 28/3/2007. When the matter was placed before this Court, this Court has issued notice on 19/7/2007 and pursuant to the said notice, Mr.P.K.Jani, learned senior counsel

appears on behalf of the respondent-husband.

5. Ms.Kachhavah, learned advocate appearing for the appellant-wife has urged that the learned Judge has erred in rejecting the restoration application.

6. On the other hand Mr.P.K.Jani, learned advocate has submitted that if the Court looks to the original decree of divorce dated 14/2/2002 and order passed by the learned Trial Court dated 27/2/2007, rejecting the application of restoration, the learned Judge has given very cogent and convincing reasons and therefore, this Court may not interfere and admit the First Appeal. The learned advocate for the respondent has submitted that moreover, since 1995, the wife has left the matrimonial home and living separately. The learned advocate for the respondent further submitted that before passing the order of divorce dated 14/2/2002, the wife had enough opportunity to appear but she did not appear and thereafter, her right to file evidence

was closed on 27/3/2001. After order of divorce, the husband has got remarried recently and therefore, there is no useful purpose of admitting the appeal and hearing the appeal in this behalf.

7. I have considered the facts and circumstances of the case. I am of the view that the learned Trial Court has passed decree of divorce on 14/2/2002 after due notice to the wife. As the wife has not entered matrimonial home since the year 1995 and husband has remarried after order of decree of divorce, situation become irretrievable. It may be noted that now, I do not see any reasons to interfere in this matter in view of the above facts and circumstances of the case.

7.1) From the facts emerges, it appears that marriage has completely broken down and therefore, the decree of divorce was given and therefore, the restoration application is rejected which is legal and valid. This Court has relied upon the judgment of the Hon'ble Supreme Court in the case of Vinita Saxena vs. Pankaj Pandit, reported in

(2006) 3 SCC 778, where the Hon'ble Supreme Court has considered the irretrievable breakdown of marriage and also in another judgment the Hon'ble Supreme Court in the case of Navin Kohli vs. Nilu Kohli, reported in (2006) 4 SCC 558 where, the Hon'ble Supreme Court has considered the human aspect and also considered that irretrievable breakdown of marriage should be statutory ground of divorce and the Court observed that a law of divorce based mainly on fault is inadequate to deal with a broken marriage.

8. In view of the above stated facts and circumstances of the case, First Appeal is dismissed summarily.

(K.M.Mehta, J.)

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